Tan Hwa Ling @ Tan Siew Leng & Ors v Tan Keng Yong @ Tan Keng Hong & Anor

HIGH COURT (JOHOR BAHRU) — SUIT NO JA–22NCvC–211–10 OF 2018
EVROL MARIETTE PETERS JC
27 MARCH 2020

Trusts and trustees — Creation of trust — No particular form or expression needed — Plaintiff claimed assets that belonged to their deceased father — Plaintiff claimed defendants had unjustly enriched themselves — Whether conditions of trust proven — Whether there was a resulting trust — Whether plaintiffs' claim barred by the doctrine of illegality there was a constructive trust — Whether the claim was barred by statute or the doctrine of laches

The plaintiffs' claimed that a trust was established in their favour with regard to the assests that belonged to the deceased, their late father. The plaintiffs, who were sisters, claimed for the recovery of the assets held on trust by the defendants (the brothers) on their behalf. It was the plaintiffs' case that all the deceased assets were held by the first defendant and the mother of the both parties (who had transferred to the second defendant the assets of the deceased held in her name) on trust for the whole family. The plaintiffs had all this while assumed that the assets of the deceased were transferred to their mother, to be held on trust for them. However, the plaintiffs' subsequently discovered that the transfer of some of the assets to the first defendant had only been effected after the deceased had passed away. Regardless, the first defendant continually assured the plaintiffs that these transfers were effected to avoid the imposition of a substantial amount of estate duty on the deceased's assets upon his death, and that all the assets would be safely held by the first defendant and their mother on trust for the whole family. The plaintiffs claimed that during the earlier years, as they were still young at the time, they had no complaints with the arrangement, since the understanding was that the returns of investment from the assets in the form of rentals and dividends would be utilised to contribute to the plaintiffs' needs, including their education and other undertakings. Furthermore, after the demise of the parents of the parties, numerous family meetings were held, as recent as February 2017, where the plaintiffs were updated of the status of the assets. However, in the last two years before instituting this action, when the plaintiffs demanded for the defendants to carry out the transfer of the trust assets and allotment of the relevant shares to the plaintiffs, the defendants refused, leaving the plaintiffs with no choice but to institute this action to enforce their position that there is a resulting trust in their favour in respect of the assets. Alternatively, the plaintiffs' claim is for a constructive trust to be declared by the court, in light of the unconscionable

conduct of the defendants. The defendants claimed that based on the documentary evidence, the transfer of the assets were meant to render the defendants the legal owners. They further submitted that the plaintiffs had failed to prove the necessary conditions to establish a trust, and that even if the plaintiffs had proved the existence of such, the defendants averred that the plaintiffs' claim was statute-barred by virtue of s 22(2) of the Limitation Act 1953, and by the doctrine of laches. The defendants further contended that the plaintiffs' claim was based on the doctrine of illegality, since it was the plaintiffs' case that the purpose of the transfer was to avoid the imposition of estate duty on the deceased's assets, upon his death. The issues to be determined were whether: (a) a resulting trust arose with regard to the assets of the deceased; (b) a constructive trust arose in respect of the assets of the deceased; (c) the plaintiffs' claim was barred by statute or doctrine of laches; and (d) the plaintiffs' claim was barred by the doctrine of illegality.

Held, allowing the claim with costs of RM25,000 subject to allocator fees:

(1) The defendant's contention that the plaintiffs had failed to establish the elements of an express trust was a non-starter as there was no reliance by the plaintiffs specifically on an 'express' trust and their pleadings were for declarations of trust, and the recovery of the trust assets. Whether the trust sought to be established by the plaintiffs was an implied, resulting and/or constructive trust, the subclassification was only a matter of words, as it still falls under the broader term of 'trust'. Therefore, regardless of the insufficient evidence to create an express trust, this court was not precluded by equity from intervening to give rise to a constructive trust if there was unconscionable conduct by the defendants (see paras 19–20 & 22).

(2) The plaintiffs had proved their narrative on a balance of probabilities, that the deceased's intention was for all his assets to be held in trust by the first defendant and the mother of the parties for the whole family. The court had no reason to disbelieve the plaintiffs' evidence. The gist of the defendants' case was one of bare denial. Further, evidence adduced by the first defendant was insufficient to discharge even the evidential burden (see paras 27–28 & 34).

(3) In light of the nature of the relationship of trust and confidence between the plaintiffs and defendants as siblings, the subsequent issue for consideration was whether the defendants' conduct was sufficiently unconscionable for a constructive trust to be imposed. The answer was in the affirmative, in view of the manner in which the defendants unjustly enriched themselves (see para 60).

(4) The plaintiffs were regarded in equity as beneficiaries to a constructive trust. The email dated 3 March 2017 was of utmost importance as it contained admissions and acknowledgements by the first defendant of

the plaintiffs' claim, and corroborated the plaintiffs' assertion that the assets of the deceased were in actual fact held in trust. The court disagreed with the defendants contention that the word 'trust' in the letter was not used in the real sense of the word, and had nothing whatsoever to do with the trust. Instead, the court was of the view that the contents of the letter, when read holistically, pointed to the truth of the plaintiffs' claim (see paras 62–65).

(5) Section 22(2) of the Limitation Act dealt with the recovery of trust property from a third party, whereas in this case, the recovery of the trust property was from the trustees themselves. The applicable provision, therefore, was s 22(1)(b), which did not prescribe any limitation whatsoever (see para 67).

(6) The equitable defence of laches was not applicable, in view of the fact that the plaintiffs, at all material times, had truly believed that the defendants, being their brothers, were holding the deceased's assets on all their behalf, and had no issue with the defendants, to continue holding the same on trust on their behalf, until only recently. Based on the undisputed facts, it was clear that the plaintiffs had not abandoned their position and that the defendants suffered no prejudice with regard to any delay, if at all (see paras 77 & 81).

(7) The doctrine of illegality had no application as what transpired was not a case of evasion of estate duty but one of avoidance, which was not illegal and the plaintiffs were not the ones who had arranged for the transfers and were not privy to the alleged 'illegality'. In fact, the parties to such 'illegality' were the defendants themselves, and as such they could not rely on such 'illegal' conduct to unjustly enrich themselves, and to prevent the plaintiffs from instituting this action against them (see paras 83–84).

[Bahasa Malaysia summary

Plaintif-plaintif menuntut bahawa satu amanah telah diwujudkan yang memihak kepada mereka berkaitan dengan aset yang dimiliki oleh si mati, arwah bapa mereka. Plaintif-plaintif, yang merupakan adik beradik perempuan, menuntut untuk pemulihan aset yang dipegang atas amanah oleh defendan-defendan (adik beradik lelaki) bagi pihak mereka. Adalah menjadi kes plaintif bahawa semua aset si mati dipegang oleh defendan pertama dan mak kedua-dua pihak (yang telah memindahkannya kepada defendan kedua aset milik si mati yang dipegang atas namanya) atas amanah kepada seluruh keluarga tersebut. Plaintif-plaintif pada semua masa menganggap bahawa aset si mati telah dipindahkan kepada ibu mereka, untuk dipegang atas amanah untuk meereka. Namun, plaintif kemudiannya mendapati bahawa pemindahan sebahagian daripada aset kepada defendan pertama hanya dilakukan selepas si mati telah meninggal dunia. Walau bagaimanapun, defendan pertama terus memberi jaminan kepada plaintif-plaintif bahawa

pemindahan ini dilakukan untuk mengelakkan pengenaan jumlah besar cukai estet atas aset si mati pada masa kematiannya, dan semua aset ini akan dipegang dengan selamat oleh defendan pertama dan ibu mereka atas amanah kepada satu keluarga. Plaintif menuntut bahawa semasa tahun-tahun awal, semasa mereka masih muda, mereka tidak mempunyai apa-apa aduan berkenaan dengan aturan ini, memandangkan fahaman adalah bahawa keuntungan dari pelaburan dari aset tersebut dalam bentuk sewaan rumah dan dividen akan digunakan untuk keperluan plaintif-plaintif termasuklah pendidikan dan beberapa akujanji lain. Lanjutan itu, selepas kematian ibu bapa pihak-pihak, beberapa mesyuarat keluarga telah diadakan, yang paling hampir adalah pada Februari 2017, yang mana plaintif telah dimaklumkan melalui perkembangan terkini status aset tersebut. Namun, dalam dua tahun terakhir sebelum memfailkan tindakan ini, plaintif-plaintif telah menuntut kepada defendan untuk lakukan pemindahan aset amanah, dan pengumpukan saham berkaitan kepada plaintif-plaintif, defendan telah enggan yang mana plaintif terpaksa untuk memfailkan tindakan ini untuk menguatkuasakan kedudukan mereka yang mana wujud amanah berbangkit yang memihak kepada mereka berkenaan dengan aset tersebut. Secara alternatif, tuntutan plaintif adalah untuk satu amanah berbangkit diisytiharkan oleh mahkamah mengambil kira tindakan tidak berpatutan defendan. Defendan menuntut berdasarkan keterangan dokumentar, pemindahan aset bertujuan untuk menjadikan defendan sebagai pemilik sah di sisi undang-undang. Mereka turut menghujahkan bahawa plaintif-plaintif gagal untuk membuktikan pra-syarat yang perlu untuk mewujudkan satu amanah, dan jikalau plaintif telah berjaya membuktikannya, defendan mengatakan bahawa tuntutan plaintif dihalang oleh statut selaras dengan s 22(2) Akta Had Masa 1953, dan oleh doktrin 'laches'. Defendan turut mengatakan bahawa tuntutan plaintif adalah berdasarkan doktrin kepenyalahan undang-undang, dan memandangkan ianya merupakan kes plaintif bahawa tujuan pemindahan tersebut adalah untuk mengelakkan pengenaan cukai estet atas aset si mati, sewaktu kematiannya. Isu untuk diputuskan adalah sama ada: (a) satu amanah berbangkit wujud berkaitan dengan aset si mati; (b) satu amanah konstruktif wujud berkaitan dengan aset si mati; (c) tuntutan plaintif dihalang oleh statut atau doktrin 'laches'; dan (d) tuntutan plaintif dihalang oleh doktrin kepenyalahan undang-undang.

Diputuskan, membenarkan tuntutan dengan kos RM25,000 tertakluk kepada fi alokatur:

(1) Pengataan defendan adalah plaintif gagal untuk membuktikan elemen amanah nyata adalah satu perkara yang tidak timbul kerana tiada kebergantungan oleh plaintif secara spesifik pada 'amanah nyata' dan pliding mereka adalah untuk pengisytiharan amanah, dan pemulihan aset amanah, subklasifikasi hanyalah berkaitan dengan penggunaan perkataan, kerana ianya masih terjumlah kepada takrifan luas 'amanah'.

Oleh itu, walaupun wujud kekurangan keterangan untuk mewujudkan satu amanah nyata, mahkamah ini tidak dihalang oleh ekuiti untuk campur tangan untuk mewujudkan satu amanah konstruktif sekiranya wujud kelakuan yang tidak wajar oleh defendan-defendan (lihat perenggan 19–20 & 22).

(2) Plaintif telah membuktikan naratif mereka atas imbangan kebarangkalian, bahawa niat si mati adalah untuk semua asetnya dipegang atas amanah oleh defendan pertama dan ibu kepada pihak-pihak untuk satu keluarga. Mahkamah ini tidak mempunyai sebab untuk tidak mempercayai keterangan plaintif-plaintif. Asas kes defendan adalah satu penafian kosong. Lanjutan itu, keterangan yang dikemukakan oleh defendan pertama adalah tidak memadai untuk melepaskan beban pembuktian (lihat perenggan 27–28 & 34).

(3) Mengambil kira sifat hubungan kepercayaan dan keyakinan antara plaintif dan defendan sebagai adik beradik, isu seterusnya untuk pertimbangan adalah sama ada perlakuan defendan adalah tidak patut untuk satu amanah konstruktif diwujudkan. Jawapannya adalah ya, mengambil kira cara yang mana defendan telah secara salah mengkayakan diri mereka (lihat perenggan 60).

(4) Plaintif dianggap dalam ekuiti sebagai benefisiari dalam satu amanah konstruktif. Emel bertarikh 3 Mac 2017 adalah penting kerana ianya mengandungi pengakuan oleh defendan pertama akan tuntutan plaintif-plaintif dan menyokong pengataan plaintif-plaintif bahawa aset si mati sememangnya dipegang atas amanah. Mahkamah tidak bersetuju dengan pengataan defendan bahawa perkataan amanah dalam surat tersebut tidak digunakan dalam maksud sebenar perkataan tersebut, dan tidak mempunyai apa-apa kaitan dengan amanah tersebut. Sebaliknya mahkamah berpandangan bahawa isi kandungan surat tersebut, apabila dibaca secara keseluruhannya, menunjukan kepada kebenaran tuntutan plaintif-plaintif (lihat perenggan 62–65).

(5) Seksyen 22(2) Akta Had Masa adalah berkaitan dengan pemulihan harta amanah dari pihak ketiga, namun dalam kes ini, pemulihan harta amanah adalah daripada pemegang amanah. Oleh itu, peruntukan yang perlu diguna pakai adalah s 22(1)(b), yang tidak meletakan apa-apa had masa (lihat perenggan 67).

(6) Pembelaan laches berasaskan ekuiti adalah tidak terpakai, mengambil kira fakta bahawa plaintif-plaintif pada semua masa material, sebenar-benarnya mempercayai bahawa defendan, yang merupakan abang mereka, sedang memegang aset si mati bagi pihak mereka, dan tidak mempunyai apa-apa isu dengan defendan, untuk terus memegang aset yang sama bagi pihak mereka sehingga kini. Berdasarkan fakta yang tidak dicabar, adalah jelas bahawa plaintif tidak meninggalkan

kedudukan mereka bahawa defendan tidak mengalami apa-apa prejudis berkaitan dengan kelewatan, sekiranya ada sekalipun (lihat perenggan 77 & 81).

(7) Doktrin kepenyalahan undang-undang tidak mempunyai apa-apa pemakaian langsung memandangkan apa yang berlaku bukanlah satu kes pengelakan cukai estet namun satu penghidaran, yang tidak haram dan plaintif bukanlah orang yang mengatur pemindahan tersebut dan tiada pengetahuan kepada keharaman yang kononnya berlaku. Sebenarnya, pihak kepada keharaman tersebut adalah defendan sendiri, dan oleh itu, mereka tidak boleh bergantung kepada tindakan haram tersebut untuk secara salah mengkayakan diri mereka, dan menghalang plaintif-plaintif daripada memfailkan tindakan ini terhadap mereka (lihat perenggan 83–84).]

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

Bombay Cotton Manufacturing Company v Motilal Shivlal ILR 1915 39 Bom 386, PC (refd)

Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2) [1969] 2 Ch 276, CA (refd)

Crawford v Financial Institutions Services Ltd (Jamaica) [2005] UKPC 40, PC (folld)

Frame v Smith and Smith [1987] 2 SCR 99; [1987]42 DLR (4th) 81 (refd)

Geok Hong Co Pte Ltd v Koh Ai Gek and Others [2019] 1 SLR 908; [2019] SGCA 15, CA (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (folld)

Hussey v Palmer [1972] 3 All ER 744, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (folld)

Koh Siew Keng (P) & Anor v Koh Heng Jin [2008] 3 MLJ 822, CA (folld)

Komoco Motors Pte Ltd v Faridah bt Abdullah [2012] MLJU 967; [2013] 3 CLJ 440, HC (refd)

Lewski v Australian Securities & Investments Commission Vid 752 of 2014 & 4 Others (2016) 337 ALR 1, FC (refd)

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)

Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals [2017] MLJU 445; [2017] 1 LNS 622, CA (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Palaniappa Chettiar v Arunasalam Chettiar [1962] 1 MLJ 143, PC (refd)

Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and

another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (refd)
RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal [2016] 1 MLJ 175, FC (refd)
Sabah Shell Petroleum Co Ltd & Anor v The owners of and/or any other persons interested in the ship or vessel the 'Borcos Takdir' [2012] 5 MLJ 515, HC (refd)
Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive [2010] NIQB 4, QBD (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289, CA (refd)
Vandervell's Trust (No 2), Re [1974] Ch 269, CA (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] 2 WLR 802, HL (refd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182; [1978] 1 LNS 244, FC (folld)

Legislation referred to

Evidence Act 1950 ss 101, 102, 114(g)
Limitation Act 1953 ss 22(1)(b), (2), 32
Trustee Act 1949 s 3

Yeo Chun Ming (CM Yeo & Assoc) for the plaintiff.
T Gunaseelan (Mala K Nathan with him) (T Gunaseelan & Assoc) for the defendant.

Evrol Mariette Peters JC:

THE BRIEF FACTS

[1] The plaintiffs (the sisters) and the defendants (the brothers) (collectively 'the parties') are siblings. Their late father, Tan Peng Khai ('the deceased') was diagnosed with colon cancer sometime in 1963, when the parties were still school-going. After several treatments in both Johor and Singapore, he passed away on 18 October 1970.

[2] It was undisputed that sometime in September 1970, through certain private arrangements made by the first defendant, his wife and his brother-in-law, one P Kamalanathan, a lawyer, the first defendant had procured relevant transfer forms for the landed assets of the deceased, supposedly to be transferred to Madam Chee Mee Sin, the mother of the parties. These transfers were effected supposedly to avoid the imposition of a substantial amount of estate duty on the deceased's assets, upon his death.

[3] The mother of the parties passed away in April, 1973 but prior to her passing, the assets of the deceased held by her were transferred to the second defendant.

[4] On 27 December 1978, a family company by the name of Hong Meng Sdn Bhd ('the family company') was incorporated and certain assets, including shares of M/s Tan Hak Heng Holdings (the extended family business from their grandfather) were transferred to the family company.

[5] In the meantime, the first defendant sold one of the assets and kept the proceeds to himself. In 2016 and 2018, the defendants had also withdrawn monies from the family company in the amounts of MYR600,000 and MYR700,000.

[6] The plaintiffs highlighted their concerns of these irregularities to the defendants, and requested that they carry out the transfer of the assets and allotment of the relevant shares of the family company to the plaintiffs. However, the defendants refused to do so, and as a result, the plaintiffs instituted this action.

THE CLAIM

[7] The plaintiffs' claim was that a trust was established in their favour, with regard to the assets that belonged to the deceased. The plaintiffs have claimed for the recovery of the following assets held on trust by the defendants, on their behalf:

(a) a shophouse address at No 100–100C, Jalan Wong Ah Fook, 80000 Johor Bahru;

(b) a shophouse address at No 96–96C, Jalan Wong Ah Fook, 80000 Johor Bahru;

(c) a rubber plantation land in Saleng, Johor;

(d) a bungalow house address at No 4, Jalan Wisata, 80200 Johor Bahru;

(e) 1/5 share of a shophouse address at No 37, Jalan Wong Ah Fook, 80000 Johor Bahru;

(f) 1/5 share of a shophouse address at No 39, Jalan Wong Ah Fook, 80000 Johor Bahru;

(g) 1/5 share of the property address at No 40, Jalan Skudai, 80200 Johor Bahru;

(h) a shophouse address at No 47, Jalanraya Skudai, 81300 Johor Bahru;

(i) the interest in the business of M/s Tan Hak Heng, was converted to shares in the holding company, M/s Tan Hak Heng (Holdings) Sdn Bhd; and

(j) public listed/traded shares owned by the deceased.

[8] I allowed the plaintiffs' claim and the following are my reasons:

THE PLAINTIFFS' CASE

[9] The gist of the plaintiffs' case is that all the deceased's assets were held by the first defendant and the mother of the parties (who had transferred to the second defendant, the assets of the deceased held in her name) on trust for the whole family.

[10] The plaintiffs had, all this while, assumed that the assets of the deceased were transferred to their mother, to be held on trust for them. However, the plaintiffs subsequently discovered that the transfer of the some of the assets to the first defendant had only been effected after the deceased had passed away.

[11] Regardless, the first defendant continually assured the plaintiffs that these transfers were effected to avoid the imposition of a substantial amount of estate duty on the deceased's assets upon his death, and that all the assets would be safely held by the first defendant and their mother on trust for the whole family.

[12] The plaintiffs claimed that during the earlier years, as they were still young at the time, they had no complaints with the arrangement, since the understanding was that the returns of investment from the assets in the form of rentals and dividends would be utilised to contribute to the plaintiffs' needs, including their education and other undertakings.

[13] Furthermore, after the demise of the parents of the parties, numerous family meetings were held, as recent as February 2017, where the plaintiffs were updated of the status of the assets.

[14] However, in the last two years before instituting this action, when the plaintiffs demanded for the defendants to carry out the transfer of the trust assets and allotment of the relevant shares to the plaintiffs, the defendants refused, leaving the plaintiffs with no choice but to institute this action to enforce their position that there is a resulting trust in their favour in respect of the assets. Alternatively, the plaintiffs' claim is for a constructive trust to be declared by the court, in light of the unconscionable conduct of the defendants.

[15] The following were called as the plaintiffs' witnesses:

(a) Tan Hwa Ling @ Tan Siew Leng (PW1), the first plaintiff;

(b) Tan Siew Hoon (PW2), the second plaintiff; and

(c) Tan Siew Ching (PW3), the third plaintiff.

THE DEFENDANTS' CASE

[16] The defendants claimed that based on the documentary evidence, the transfer of the assets were meant to render the defendants the legal owners. They further submitted that the plaintiffs had failed to prove the necessary conditions to establish a trust, and that even if the plaintiffs had proved the existence of such, the defendants averred that the plaintiffs' claim was statute-barred by virtue of s 22(2) of the Limitation Act 1953 ('the Limitation Act'), and by the doctrine of laches.

[17] The defendants further contended that the plaintiffs' claim was based on the doctrine of illegality, since it was the plaintiffs' case that the purpose of the transfer was to avoid the imposition of estate duty on the deceased's assets, upon his death.

[18] The sole witness for the defendants was Tan Keng Yong (DW1), the first defendant.

CONTENTIONS, EVALUATION AND FINDINGS

Whether a resulting trust arose with regard to the assets of the deceased

[19] At the outset, the defendants' submission was that the plaintiffs had failed to establish the elements of an express trust.

[20] In my view, this contention is a non-starter as there was no reliance by the plaintiffs specifically on an 'express' trust. In fact, in their pleadings, the reliefs prayed were for declarations of trust, and the recovery of the trust assets.

[21] It is pertinent to note that the definition of 'trust' is not confined to an 'express' one. Reference is made to s 3 of the Trustee Act 1949, where 'trust' is defined as follows:

> Section 3 — *Interpretation*
>
> 'trust' does not include the duties of chargee, but with this exception the expressions 'trust' and 'trustee' extend to *implied and constructive trusts*, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative and 'trustee', where the context admits,

A includes a personal representative, and 'new trustee' includes an additional trustee;

[22] As such, whether the trust sought to be established by the plaintiffs is an implied, resulting and/or constructive trust, the subclassification is only a matter of words, as it still falls under the broader term of 'trust'. Therefore, regardless of the insufficient evidence to create an express trust, this court is not precluded by equity from intervening to give rise to a constructive trust if there was unconscionable conduct by the defendants.

[23] A resulting trust is a trust implied by operation of law, where by virtue of the transfer of property to a person for no consideration, the transferee is, therefore, implied to hold the property for the benefit of another person. A resulting trust, which is a creation of the law of equity rather than common law, arises in the absence of an express declaration or intention, in circumstances where although the transferee holds legal title, he is not the equitable owner.

[24] A resulting trust is 'traditionally regarded as an example of a trust giving effect to the common intention of the parties. It is a trust that gives effect to his presumed intention': per Lord Brown Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 WLR 802. See also *Re Vandervell's Trust (No 2)* [1974] Ch 269.

[25] This definition of a resulting trust has been assimilated into Malaysian jurisprudence through a plethora of cases including the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, where the role of the court has been described by Gopal Sri Ram FCJ, in the following words:

> In our judgment, the primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is clear. It is to determine whether the initial disponor intended to make a gift of the property be it movable or immovable, or whether he or she intended it to be held by the disponee in trust for some other person or persons, including the disponor or disponee or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. If the intention of the parties when objectively determined was that the particular property was to be held on a resulting trust then that is the conclusion the court should declare. However, if the intention was that the disponee of the property was to have it as a gift, there can then be no question of a resulting trust being implied. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. Were it otherwise, the court may be arriving at an incorrect conclusion based on a presumption when the evidence points in quite the opposite direction.

[26] As such, the issue for consideration in this case revolved around the true intention of the deceased, in respect of the distribution of all his assets. **A**

[27] This was a case of whose version was true. In my view, the plaintiffs had proved their narrative on a balance of probabilities, that the deceased's intention was for all his assets to be held in trust by the first defendant and the mother of the parties (who had transferred to the second defendant, the assets of the deceased held in her name), for the whole family. This was based on the following: **B**

C

[28] I had no reason to disbelieve the plaintiffs' evidence that the deceased, from 1963 until about three weeks before his death, had continually assured his school and university going children at that time that all his assets would be sufficient to provide for them, after his demise.

D

[29] The credibility of a witness 'embraces not only the concept of his truthfulness, that is, whether the evidence of the witness is to be believed, but also the objective reliability of the witness, that is, his ability to observe or remember facts and events about which the witness is giving evidence': per Gillen J in *Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive* [2010] NIQB 4. **E**

[30] It is pertinent to note that 'in the cross-examination of a witness, everything depends on the judge's belief or disbelief in the witness' story:' per Sir George Farwell in the Privy Council case of *Bombay Cotton Manufacturing Company v Motilal Shivlal* ILR 1915 39 Bom 386. **F**

[31] On the whole, the plaintiffs were convincing in their narrative. I found the first plaintiff, especially, to be forthright and consistent. She did not mince her words or evade questions, and answered them with clarity and in detail. Whatever contradictions that arose in her evidence were explained by her, to the satisfaction of court, during re-examination. The first plaintiff's evidence was also corroborated by the equally convincing testimony of the second and third plaintiffs, and to a great extent, by the first defendant himself. **G** **H**

[32] What was apparent during cross-examination of the first plaintiff was her reluctance in having to institute this action against the defendants who are her own brothers. She was earnest in her explanation that her reasons for doing so was to assert what rightfully belonged to her and her sisters, and that she had no intention to aggravate the relationship with her brothers that had already deteriorated. In fact, she was keen on wanting to salvage whatever that was left of the relationship. **I**

A **[33]** It must be borne in mind that whilst the legal burden was imposed on the plaintiffs to prove their case on a balance of probabilities as prescribed by ss 101 and 102 of the Evidence Act 1950 ('the Evidence Act'), the defendants, on the other hand, had the evidential burden to raise sufficient evidence to ensure that the probabilities were either equal or tilted in their favour.

B

[34] In this case, the gist of the defendants' case was one of bare denial. This was adduced through the first defendant, whose testimony was vague and imprecise. He merely disputed the intention of the deceased, although there was overwhelming evidence otherwise, that pointed to the wishes of the C deceased to provide for all his children, and that the transfers were instructed to avoid the imposition of estate duty on the deceased's assets, upon his death. In my view, the evidence adduced by the first defendant was insufficient to discharge even the evidential burden.

D

[35] It is pertinent to note that although the transfer of some of the assets to the first defendant was purportedly effected for a consideration sum payable by the first defendant to the deceased, there was no evidence whatsoever of such payment. Although the first defendant testified that the consideration sum was E arranged by M/s Tan Hak Heng, the fact of the matter was that it was not paid by the first defendant himself. In my view, this strengthened the plaintiffs' claim that the transfer was not an actual sale, but was effected to avoid the imposition of estate duty on the deceased's assets, upon his death.

F

[36] Based on the assurances that the deceased had made to the plaintiffs that they would be provided for, it would have been uncharacteristic of the deceased, particularly on his death-bed, to have transferred all his assets to his sons, the defendants, and his wife, and to leave his three daughters, the G plaintiffs, who were at that time still studying, with nothing whatsoever. Hence, regardless of whether the purported transfers were for monetary consideration, or for 'love and affection', the court is not prevented by equity, to intervene to give rise to a resulting trust or, alternatively to declare a constructive trust in favour of the plaintiffs.

H

[37] Furthermore, the absence of a will of the deceased substantiated the plaintiffs' contention that the intention of the deceased was for all his assets to be distributed equally amongst all his children.

I **[38]** With regard to the second defendant, although he had pleaded in the statement of defence that the assets transferred to him were, in actual fact, gifts from the parents of the parties, he chose not to take the stand as a witness, and inevitably not to be subjected to cross-examination.

[39] The issue that arose as a result of the failure of the second defendant to take the stand as a witness was whether the court should draw an adverse inference against the defendants. It is pertinent to note that the defendants had also failed to call the first defendant's brother-in-law, Mr P Kamalanathan, the lawyer who was engaged by the first defendant to handle the transfer of the assets.

[40] In this connection, reference is made to illustration (g) of s 114 of the Evidence Act, which reads:

> Section 114 — Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[41] In this case, both the second defendant and Mr P Kamalanathan had their names stipulated in the list of witnesses, yet no explanation or justification was proffered regarding their absence.

[42] As stated in the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, the evidence that is referred to in s 114(g) of the Evidence Act must not only be relevant, it must be material. Counsel for the defendants, in his submission, contended that there was no need for both the second defendant and Mr P Kamalanathan to be called as they were not significant. I am unable to agree with such contention as I found that both persons were not only relevant to the case, they were absolutely material to explain the narrative of the defendants.

[43] With regard to the second defendant, his testimony would have had a bearing on the intention of the deceased, as his pleaded case was that the assets that were ultimately transferred to him, were gifts from the deceased and his mother. However, he chose not to take the stand and not to give any evidence (and be subjected to cross-examination) during the trial, although he was listed as a witness in the defendants' list of witness.

[44] With regard to Mr P Kamalanathan, as he was present during the incident, he would have been able to enlighten the court on the nature of the transfer by the deceased to the first defendant, and why the transfer was effected

in 1971, after the deceased's death. However, that did not materialise as Mr P Kamalanathan was not produced as a witness, although he too was listed in the defendants' list of witness.

[45] Reference is made to *Sabah Shell Petroleum Co Ltd & Anor v The owners of and/or any other persons interested in the ship or vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (as she then was):

> ... The person best placed to explain fully the events of the day would have been the Master but the defendant failed to call the master as witness. Stating that he was uncooperative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s 114(g) against the defendant ...

[46] I am also guided by the cases of *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33, *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, and *Crawford v Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40.

[47] As such, an adverse inference was drawn against the defendants for failing to produce both the second defendant and Mr P Kamalanathan.

[48] The refusal of the second defendant to be cross-examined coupled with the adverse inference drawn, and my assessment and evaluation of the plaintiffs and first defendant, as well as the evidence adduced by them, have cemented the truth of the plaintiffs' testimony.

Whether a constructive trust arose in respect of the assets of the deceased

[49] In the event that the true intention of the deceased with regard to the distribution of his assets is unable to be ascertained to give rise to a resulting trust, the plaintiffs submitted that a constructive trust should be imposed instead. This is in view of the unconscionable conduct of the defendants in failing to uphold the mutual understanding between the parties at all material times that the assets derived from the deceased were to be held by the defendants on trust on behalf of all his children.

[50] At this juncture, reference is made to the explanation by Lord Denning MR in the case of *Hussey v Palmer* [1972] 3 All ER 744, where it was stated that a constructive trust is a 'trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or

a share in it', and that 'the court must look at the circumstances of each case to decide in what way the equity can be satisfied', as each case would depend very much on its own narrative and circumstances.

[51] A constructive trust is one that is imposed by law irrespective of the intention of the parties, and one that arises whenever the circumstances are such that it would be unconscionable for the owner of property to assert his own beneficial interest in the property and deny the beneficial interest of another. It is one where the trustee does not receive the trust property in his own right but by a transaction intended to create a trust from the outset. 'His possession of the property is coloured from the beginning by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust': per Millett LJ in *Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400.

[52] The boundaries of a constructive trust 'have been left deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand': per Edmund Davis LJ in *Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2)* [1969] 2 Ch 276.

[53] Reference is also made to the cases of *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175, *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289.

[54] An analogy may again be drawn to *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, where two main features that give rise to a constructive trust are: (a) the nature of the relationship between the plaintiffs and defendants; and (b) the element of unjust enrichment or lack of probity on the part of the defendants.

[55] In the present case, there was no doubt that the relationship between the plaintiffs and the defendants, as siblings, was one of trust and confidence, where, as prescribed by Wilson J in *Frame v Smith and Smith* [1987] 2 SCR 99; [1987]42 DLR (4th) 81, the following three features existed:

(a) the fiduciary had scope for the exercise of some discretion of power;

(b) the fiduciary could unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

(c) the beneficiary was peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

[56] In the present case, the first defendant, being the eldest brother, commanded a certain level of respect and control over his younger sisters, the plaintiffs, at the material time, especially when all the plaintiffs were young and vulnerable as they were still studying and had just lost their father, and, therefore, had required the support of the first defendant.

[57] Such vulnerability, as described in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, arose from the 'inability of the beneficiary to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power'.

[58] At that material point in time, the first defendant stood in a fiduciary position, more so when the parents of the parties had left it to the first defendant, as the eldest son and oldest child, to address family issues, including dealing with the deceased's assets and providing for the deceased's children.

[59] It was also held in the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, that 'if a trustee or other fiduciary acquires property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary'.

[60] In light of the nature of the relationship of trust and confidence between the plaintiffs and defendants as siblings, the subsequent issue for consideration was whether the defendants' conduct was sufficiently unconscionable for a constructive trust to be imposed. The answer is in the affirmative, in view of the following manner in which the defendants unjustly enriched themselves:

(a) the defendants had withdrawn the substantial sums of MYR600,000 and MYR700,000 in October 2016 and July 2018 respectively, from the family company, for their own use;

(b) the first defendant had sold the 1/5 share of the property address at No 40, Jalan Skudai, 80200 Johor Bahru sometime in 2016 for MYR1,482,000 and kept the proceeds to himself; and

(c) the second defendant, in June 2018, had transferred 4/9 of the rubber plantation land in Saleng, Johor, to his children, and had taken out a substantial loan using the land as collateral.

[61] There was also a lack of probity on the part of the defendants in denying the plaintiffs' beneficial ownership to the assets of the deceased based on his intention.

[62] This was especially in light of an email dated 3 March 2017 from the first defendant to the first plaintiff (exhibited at pp 15–16 of Part B of the common bundle of documents) which reads:

...

You are correct, we are in our twilight years and I do not need to put up with any of these lies anymore. In Tan Hak Heng (THH), Meng [the second defendant] has gone back on his word regularly; he has taken money from the company and caused great loss to all involved. The only reason why they have not reported him — is out of respect for me. ...

... Why is it that when he [Meng] agrees to share Saleng land, he quickly takes a multi-million ringgit loan using the Saleng land as collateral? This Saleng land which was put in trust in Meng's name was to be shared amongst all of us. It would be more than enough for all of us to have comfortable lives ...

...

I am not against SH [the second plaintiff] having a comfortable life. In order to help her, all I wish for is that the accounts of Hong Meng (HM) to be sorted out and updated. As Li is aware HM's last audited account was submitted in 2001 which showed it was losing money; and the mess that has been created by Meng not only affects HM but also I have to pay hefty fines for late submission. I feel without even resolving HM accounting mess and it was a losing concern before, we do not know the quantum which can be dispensed. Meng has taken another 300k from HM. He and Li have signed for the cheques made out to me and to him. Never mind about the millions he has borrowed using Saleng land as collateral or the monies he has taken from HM and THH ... Once the accounts are done and SH has enough to live out her life, I would like HM to be dissolved. After that, I want nothing more to do with SH or Meng again.

If you can understand why I am so saddened, then I would like you to come to visit, for me to spend quality time with you. If you do come, please do not bring the matter up again. In retrospect, I should have never got any of the inheritance put in Meng's name. I thought it was the best decision at the time as I wanted to give Meng some sense of responsibility and I am an academic not used to dealing with financial and legal matters. But I never thought it would bring so much shame and sadness to me.

If you wish to further help SH or get back your share of the Saleng land, you all may feel free to proceed on your own. If you wish to proceed with litigation, Meng and 6th Uncle did state under oath, during a court case between THH and Keng Leng, that they held the shares and property in trust. The other families have all shared their respective family share of Saleng land equally amongst their siblings. You should now know after several previous meetings that it is no fault of mine we do not have any share of Saleng.

...

[63] The letter above is of utmost importance as it contains admissions and acknowledgements by the first defendant of the plaintiffs' claim, and clearly corroborates the plaintiffs' assertion that the assets of the deceased were in actual fact held in trust.

[64] Counsel for the defendants contended that the word 'trust' in the letter was not used in the real sense of the word, and had nothing whatsoever to do with the trust that the plaintiffs claimed was intended by the deceased. I am unable to agree with such contention, as it is my view that the contents of the letter, when read holistically, points to the truth of the plaintiffs' claim.

[65] Based on the aforesaid facts, therefore, the plaintiffs are regarded in equity as beneficiaries to a constructive trust.

Whether the plaintiffs' claim was barred by statute or by the doctrine of laches

[66] The defendants contended that the plaintiffs' claim was statute-barred by s 22(2) of the Limitation Act, which reads:

> Section 22 — Limitation of actions in respect of trust property
>
> ...
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

[67] In my view, the defendants' contention is misconceived, in view of the fact that s 22(2) of the Limitation Act deals with the recovery of trust property from a third party, whereas in the case before us, the recovery of the trust property was from the trustees themselves. The applicable provision, therefore, is s 22(1)(b), which does not prescribe any limitation whatsoever. The section reads:

> Section 22 — Limitation of actions in respect of trust property
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover *from the trustee trust property* or the proceeds thereof in the

possession of the trustee, or previously received by the trustee and converted to his use.

[68] I am guided by the Court of Appeal in *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822, where it was held that the defence of limitation does not apply to recovery of property wrongly appropriated by a person whom equity holds accountable, and where the trustee, as in this case, was guilty of unconscionable conduct.

[69] The defendants' plea of limitation, therefore, fails since s 22(1)(b) of the Limitation Act provides that no period of limitation prescribed by the Act applies 'to an action by a beneficiary under a trust being an action to recover from the trustee trust property ... in the possession of the trustee or previously received by the trustee and *converted* to his use'.

[70] The defendants had also relied on the doctrine of laches and contended that by virtue thereof, the plaintiffs' claim should be barred. Reference is made to s 32 of the Limitation Act, which reads:

Section 32 — Acquiescence

Nothing is this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

[71] Laches is established when two conditions are fulfilled. In the first place, there must be unreasonable delay in the commencement or prosecution of proceedings. Secondly, in all the circumstances, the consequences of delay must render the grant of relief unjust.

[72] The often cited principle of laches is found in the enlightening passage by Lord Selborne in the landmark case of *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221; (1874) LRPC 221:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[73] Laches has been aptly described as 'inaction with one's eyes open' by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, in the following passage:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'.

[74] I am also guided by the court in *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; [1978] 1 LNS 244 which was adopted in *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445; [2017] 1 LNS 622.

[75] In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; [1978] 1 LNS 244, the following observations were made by Hashim Yeop A Sani J:

> To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A Court of equity would refuse its aid to stale demands, ie where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligent inactivity. He is then said to be barred by his laches (*Halsbury's* 3rd Ed Vol 14, p 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part.

[76] It is, therefore, an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. Hence, where the plaintiff has slept upon his right and acquiesced for a great length of time, based on the maxim *vigilantibus non dormientibus, jura subveniunt* (the court of equity has always refused its aids to stale demands, when a party has slept on his rights and acquiesced for a great lent of time), a court of equity would refuse its aid.

[77] In the case before us, the equitable defence of laches is not applicable, in view of the fact that the plaintiffs, at all material times, had truly believed that the defendants, being their brothers, were holding the deceased's assets on all their behalf, and had no issue with the defendants, to continue holding the same on trust on their behalf, until only recently when the following incidents took place:

(a) in October 2016 and July 2018, the defendants withdrew MYR600,000 and MYR700,000 respectively, from the family company, for themselves;

(b) in 2016, the first defendant sold the 1/5 share of the property address at No 40, Jalan Skudai, 80200 Johor Bahru, and kept the proceeds to himself;

(c) in 2018, the second defendant transferred 4/9 of the rubber plantation land in Saleng, Johor, to his children, and took out a substantial loan on the same; and

(d) in February 2017, at a meeting at the Mutiara Hotel, Johor Bahru, the defendants took the position to refuse to recognise the plaintiffs' interests in the deceased's assets.

[78] The defendants, in relying on several cases including *Komoco Motors Pte Ltd v Faridah bt Abdullah* [2012] MLJU 967; [2013] 3 CLJ 440, *Geok Hong Co Pte Ltd v Koh Ai Gek and Others* [2019] 1 SLR 908; [2019] SGCA 15 and *Lewski v Australian Securities & Investments Commission Vid 752 of 2014 & 4 Others* (2016) 337 ALR 1, contended that the plaintiffs had acquiesced to the conduct of the defendants, as the plaintiffs had not raised any issues pertaining to the same in the past.

[79] In my view, this contention is untenable in view of the fact that the incidents that the plaintiffs had referred to had occurred only in the last two years before this action was instituted.

[80] Furthermore, the fact that the plaintiffs and defendants were siblings, and that the first plaintiff had even demonstrated her reluctance in instituting this action against the defendants who are her brothers, were indicators that should reduce the weight given to the equitable defence of laches.

[81] Based on the undisputed facts, it was clear that the plaintiffs had not abandoned their position and that the defendants suffered no prejudice with regard to any delay, if at all.

Whether the plaintiffs' claim was barred by the doctrine of illegality

[82] The defendants in relying on the cases of *Palaniappa Chettiar v Arunasalam Chettiar* [1962] 1 MLJ 143 and *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619, contended that the plaintiffs' claim was based on the doctrine of illegality, since it was undisputed that the purpose of the transfer was to prevent the assets from being subjected to the imposition of estate duty on the deceased's assets, upon his death.

[83] In my view, this argument is misconceived, since what transpired was not a case of evasion of estate duty but one of avoidance, which is not illegal.

[84] Secondly, the plaintiffs were not the ones who had arranged for the transfers and were not privy to the alleged 'illegality'. In fact, the parties to such 'illegality' were the defendants themselves, and as such they could not rely on such 'illegal' conduct to unjustly enrich themselves, and to prevent the plaintiffs from instituting this action against them.

CONCLUSION

[85] Based on the aforesaid reasons, and after judicious consideration of all the evidence before me, both oral and documentary, as well as submissions of counsel for both parties, the plaintiffs' claim is allowed in para 29(aa), (aaa), (bb), (bbb), (cc), (ccc), (d) (e) and (f) of the statement of claim, with costs in the amount of MYR25,000 (subject to allocatur fees).

Claim allowed with costs of RM25,000 subject to allocator fees

Reported by Izzat Fauzan